

ATTACHMENT H

**November 23, 2015 Letter
IRGI to Tracie White and Curtis Stovall
COLORADO DEPARTMENT OF PUBLIC
HEALTH AND ENVIRONMENT**

ENFORCEABLE AGREEMENT (“EA”)

Enforceable Agreement

Between

State of Colorado Department of Public Health and Environment

and

United States Air Force

Pursuant to Colorado Executive Order D 013-98

I Purpose.

- A. This Enforceable Agreement ("Agreement") sets forth the United States Air Force ("USAF") commitment to ensure that all remedial action necessary to protect human health and the environment with respect to a particular parcel of property ("Parcel") at the former Lowry Air Force Base site, in Denver, Colorado ("LAFB") will be taken. The Parcel, as defined in the Consent Agreement ("Consent Agreement") between the Colorado Department of Public Health and Environment (the "Department"), the Lowry Assumption, LLC ("LAC") and the Lowry Economic Redevelopment Authority ("LERA"), is more particularly described in Exhibit A, attached hereto. The Parcel is the subject of this Agreement and is being transferred to the "LERA" in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 120(h)(3)(C). The Parcel has contamination remaining above regulatory standards, which may present a potential risk to human health or the environment.
- B. The Department, and LAC and LERA have entered into a Consent Agreement, (which is incorporated by reference to this Agreement) of substantially even date herewith which sets forth the manner in which LERA and LAC will fulfill the remediation obligations of the USAF under CERCLA with regard to the Parcel. These obligations will be fulfilled by LERA and LAC pursuant to the Colorado Hazardous Waste Management Act, §§ 25-15-301 through 327 C.R.S. and the Colorado Hazardous Waste Regulations, 6 CCR 1007-3. The Consent Agreement contains, among other provisions, time schedules, clean-up standards and termination provisions. LERA is a party to the Consent Agreement for the limited purpose of ensuring that funding provided to LERA under the Cooperative Agreement will be utilized to fund the performance of required tasks under the Consent Agreement.
- C. The USAF and LERA have entered into a Cooperative Agreement for Environmental Services ("Cooperative Agreement"), which, among other things, provides for the funding to LERA, which will be utilized for the completion of the environmental clean-up of the Parcel pursuant to the Consent Agreement.

- D. This Agreement delineates the USAF's cleanup responsibilities, including operation and maintenance, monitoring, and reporting related to this Parcel following the termination of the Consent Agreement or default by LAC or LERA of their respective obligations under the Consent Agreement.
- E. This Agreement reiterates the USAF's commitment under the Cooperative Agreement to fund LERA to perform environmental services which are intended to satisfy the obligations under the Consent Agreement, including stakeholder involvement related to this Parcel.
- F. This Agreement provides a mechanism for the Department to enforce the USAF's remaining remediation obligations with regard to the Parcel, including, without limitation, the USAF's obligations to (i) complete the cleanup of "Non-Covered Conditions" and "the Air Force Obligations" at the Parcel, as said terms are defined in the Cooperative Agreement, and (ii) complete the cleanup of the Parcel following the termination, or other default by LAC or LERA of their obligations, under the Consent Agreement.
- G. The USAF agrees not to challenge the issuance of this Agreement or the Consent Agreement; the factual and legal determinations made by the Department in this Agreement or the Consent Agreement; and the Department's authority to bring, or the authority of a court of competent jurisdiction to hear, any action to enforce the terms of this Agreement or the Consent Agreement.
- H. Nothing in this Agreement paragraph shall preclude the Department from imposing additional requirements necessary to protect human health or the environment. Nor shall anything in this Agreement preclude the Department from imposing additional requirements in the event that new information is discovered that indicates such requirements are necessary to protect human health or the environment.
- I. This Agreement also provides that the USAF will reimburse the Department for its oversight activities hereunder and under the Consent Agreement in accordance with the terms of the Department of Defense and State of Colorado Memorandum of Agreement ("DSMOA") or other appropriate funding mechanism as agreed upon by the USAF and the Department; and not inconsistent with the provisions of 10 U.S.C. § 2701(d)(1). It is understood that the Department will seek such changes to Colorado law prior to June 30, 2004, as needed to enable it to accept oversight payments directly from the LERA without constraining the Department's ability to provide services.

II Legal Basis for the Agreement.

A. Background.

1. Congress enacted CERCLA § 120(h), 42 U.S.C. § 9620 to protect citizens and communities from the costs of cleaning up contamination on land transferred to them by federal agencies. CERCLA requires the United States to grant a covenant

indicating that all remedial action necessary to protect human health and the environment, with respect to any hazardous substances remaining on the federal property has been taken prior to transfer of the property. However, CERCLA § 120(h)(3)(C) authorizes the deferral of this covenant and the "early" transfer of the property before all necessary remedial action has been taken at the federal property if certain conditions are met. Among other things, "early" transfers of contaminated federal property not listed on the National Priorities List (NPL) are subject to the approval of the governor of the state where the property is located.

2. To implement the provisions of CERCLA 120(h)(3)(C) the Governor of Colorado issued Executive Order D 013-98 requiring that, among other things, the Director of the Colorado Statewide Defense Initiatives (the "Director") together with the Department develop evaluation criteria and review procedures for requests by federal agencies to transfer property prior to final remediation. In response to the Executive Order, the Director and the Department issued the "Joint Policy Establishing Evaluation Guidelines and Review Procedures Pertaining to Deferral Requests" ("Joint Policy").
3. Pursuant to the Executive Order D 013-98 and the Joint Policy the USAF has requested a CERCLA section 120(h)(3)(C) covenant deferral for an "early" transfer of the Parcel. This Agreement fulfills, in part, the requirements of the Executive Order and provides a legal mechanism for the Department to enforce the terms of this Agreement and the enforceable clean-up plan set forth in the Consent Agreement dated August 7, 2002 among the Department, LAC and LERA relative to this Parcel, and to provide technical and legal oversight of the remediation, and long-term operation and maintenance related to the remediation of this parcel.

B. Basis for the Department's Enforceability.

1. CERCLA 120(h)(3)(A)(ii) requires that any deed transferring property owned by a federal agency on which hazardous substances was stored, released or disposed of contain a covenant warranting that: 1) the federal agency has concluded all necessary remediation before the date of transfer and 2) the federal agency is responsible for all future remediation found to be necessary after the date of transfer. In the event, however, that the federal agency desires to transfer the property prior to the completion of all remediation, CERCLA § 120(h)(3)(C) requires the federal agency to include in the conveyance document or deed certain assurances that the agency will fully remediate the property. These assurances are designed to protect human health and the environment and include provisions for: 1) all necessary restrictions on the use of the property, including those that will ensure that remedial investigations, response actions, and oversight activities will not be disrupted, and 2) all necessary response actions, including the identification of schedules for investigation and completion of such actions. Pursuant to § 25-15-308 C.R.S., these assurances are enforceable as a "standard, regulation, condition, requirement, or order" of Part 3 of the Colorado Hazardous Waste Management Act ("CHWMA") §§ 25-15-301 through 327, C.R.S. Accordingly, the Department has

the authority to enforce the commitments of the USAF as set forth in Section III hereof.

2. The State, acting by and through the Department, will be included as a third-party beneficiary in the transfer deed for the Parcel given to LERA by the USAF ("Deed"). The Deed will include the covenants and assurances mandated by sections 120(h)(3)(A)(ii)(II) and 120(h)(3)(C)(ii) of CERCLA (hereinafter collectively referred to the "CERCLA Covenants") and environmental covenants as required by § 25-15-321 of the Colorado Hazardous Waste Act. Such environmental covenants are enforceable by the Department pursuant to § 25-15-322, C.R.S. or otherwise provided by applicable law.

III Commitments of the USAF

- A. The USAF commits to fund the performance of all necessary remedial or response actions that are taken with respect to the Parcel as set forth in the Consent Agreement, including the remediation of OU2 and OU5. Furthermore, the USAF agrees to grant and comply with the CERCLA Covenants following the achievement of regulatory closure under the Consent Agreement, and to make any adjustments to land use and/or institutional controls required by compliance with the CERCLA Covenants.
- B. If the Consent Agreement is terminated in accordance with its terms, the USAF agrees to (i) within thirty (30) days of the receipt of written notice from the Department of such termination, initiate the completion, and thereafter complete the environmental clean-up of the Parcel, including, without limitation, all operation and maintenance, long-term monitoring and reporting requirements, (a) in accordance with Section 120(h) of CERCLA and the schedules set forth in the Corrective Action Requirements section of the Consent Agreement unless otherwise mutually agreed upon by the USAF and the Department, or (b) in accordance with the terms of the Consent Agreement; (ii) prior to and following the completion of the cleanup, grant and comply with the CERCLA Covenants with regard to the Parcel, including, without limitation, make any adjustments to the institutional controls and/or land use controls required by compliance with the CERCLA Covenants; and (iii) enforce any enforceable provisions of any insurance policies acquired by LERA or LAC pursuant to the Cooperative Agreement which provide for remediation activities at the Parcel following the transfer thereof to LERA.
- C. The USAF commits to fund the costs associated with all aspects of the environmental remediation under the Consent Agreement, including stakeholder involvement related to this Parcel, as provided in the Cooperative Agreement.
- D. In addition, the USAF agrees to reimburse the Department in accordance with the terms of the DSMOA or other appropriate funding mechanism as agreed upon by the USAF and the Department; and not inconsistent with the provisions of 10 U.S.C. § 2701(d)(1), to cover costs for the Department to provide technical services and oversight for activities associated with this Agreement. It is understood that the

Department will seek such changes to Colorado law prior to June 30, 2004, as needed to enable it to accept oversight payments directly from the LERA without constraining the Department's ability to provide services.

- E. The USAF commits that the funding as provided in paragraphs III. A, C, and D, above will be provided for via the USAF's established annual budget request process. The Parties agree that the USAF reserves the right, in any administrative or judicial proceeding seeking to enforce the requirements of this Agreement, to raise as a defense that any failure or delay was caused by the unavailability of appropriated funds. In particular, nothing herein shall be construed as precluding the USAF from arguing that any provision of this Agreement requires the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1301 or 1341. While the State disagrees that an Anti-Deficiency Act defense, or any other defense based on lack of funding exists, the Parties agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.
- F. The Deed(s) shall specify that any environmental covenant or institutional controls at the parcels shall run with the land in perpetuity and remain in-place regardless of site ownership. Such environmental covenant or institutional control may be modified or terminated only with the prior written agreement of the Department.
- G. The Parties agree that the Department may enforce the terms of the environmental covenants contained in the deed, pursuant to §25-15-322, C.R.S., and any named beneficiaries of these covenants may file suit in State district court to enjoin actual or threatened violations of this covenants. Nothing in this agreement shall be construed to preclude the United States from removing suit filed in a State district court to the appropriate Federal court should the United States be named as a party or join in the suit. The USAF concurs with the State of Colorado requirement that the United States, State of Colorado, and local governing bodies are third-party beneficiaries for the purposes of enforcing the land use restrictions contained in the Deed until such time as the restrictions are removed.
- H. The Deed shall provide the United States and the State of Colorado, or their designees access to the parcel to perform oversight or cleanup activities as required by the Consent Agreement, this Agreement or by § 120(h) of CERCLA or applicable law. A copy of such access provisions are attached to this Agreement as Attachment B.
- I. The Deed shall include the appropriate CERCLA Covenants, that specify that the USAF remains responsible for conducting any additional necessary remedial actions for previously unknown contamination attributed to its activities on the site, and that LERA and its transferees, successors, assigns or lessees will be responsible for conducting remedial actions related to contamination caused by their activities subsequent to date of the deed transfer. Remediation of such subsequently created contamination is not within the scope of this Agreement.
- J. The USAF commits that it will comply with this Agreement and to the extent

required by applicable law, will not raise sovereign immunity as a defense to any action to enforce this Agreement.

- K. The USAF acknowledges that its Request for Deferred Remediation at the Parcel, in accordance with federal law, shall not increase, diminish, or affect in any manner any rights or obligations of the DOD (including any rights or obligations under Sections 106, 107 and 120 of CERCLA) existing prior to transfer with respect to the Parcel.
- L. The USAF is not released from any liability for contamination that remains on LAFB except to the extent these liabilities are assumed and satisfied by LERA and LAC under the Consent Agreement and/or the Cooperative Agreement. With specific regard to "Non-Covered Conditions" or "Air Force Obligations" in the Cooperative Agreement, the USAF agrees to either (i) complete the clean-up thereof under Section 120(h) of CERCLA in accordance with the schedule attached hereto as Exhibit B, or in accordance with applicable law; or (ii) if such "Non-Covered Condition" or "Air Force Obligation" is currently unknown and subsequently discovered, complete the remediation thereof in accordance with the provisions of Section 120(h) of CERCLA, Paragraph III. B. above, or in accordance with applicable law.
- M. The Deed will contain appropriate references to the indemnification provisions in Section 330 of the National Defense Authorization Act for Fiscal Year 1993, as amended.

The undersigned warrant that they are authorized to bind legally their respective principals to this Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Agreement.

Albert F. Lowas, Jr. Director

Air Force Base Conversion Agency

The United States Air Force

Date _____

Douglas H. Benevento

Director, Office of Environmental Programs

Colorado Department of Public Health and Environment

Date _____